Supreme Court, U.S.
FILED
OCT 7 2002
OFFICE OF THE CLERK

No. 02-367

In The

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE and BRANDON GEYE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

KERWIN B. STEPHENS
Counsel of Record
STEPHENS & MYERS, L.L.P.
515 Fourth Street
Graham, Texas 76450
(940) 549-4758

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether, in light of the fact that the decision below is interlocutory, the Texas Supreme Court's judgment qualifies for review under the fourth exception to finality set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

If so, whether the congressionally authorized efficacy data requirement waiver found in the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(5), and implemented by the Environmental Protection Agency ("EPA") by 40 C.F.R. 158.540 includes data pertaining to target area phytotoxicity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
RESPONDENTS' BRIEF IN OPPOSITION	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. THE COURT LACKS JURISDICTION	3
A. The Decision of the Texas Supreme Court is not Final on all Federal Issues	3
B. Delaying Review of the Decision of the Texas Supreme Court Would not Seriously Erode Federal Policy	6
II. THE DECISION BELOW DOES NOT CREATE A CONFLICT	9
III. THE DECISION BELOW IS CORRECT	12
CONCLUSION	15
APPENDIX Plaintiff's Third Amended Petition (*Geye v. American Cyanamid Co.*, No. 35,851 (Tex. Dist. Ct., Eastland Cty., Aug. 14, 1998))	1a

TABLE OF AUTHORITIES

Page

CASES

Andrus v. AgrEvo USA Co., 178 F.3d 395 (5th Cir. 1999) 10, 11, 12

Arkansas Elec. Coop. Corp. v. Arkansas, Pub. Serv. Comm'n, 461 U.S. 375 (1983) 14

Brown v. Chas. H. Lilly Co., 985 P.2d 846 (Or. Ct. App. 1999), *review denied*, 6 P.3d 1098 (Or. 2000) 8

Cherokee Water Co. v. Gregg County Appraisal Dist., 801 S.W.2d 872 (Tex. 1990) 2

Cole v. Central Valley Chems., Inc., 9 S.W.3d 207 (Tex.App. – San Antonio 1999, pet. denied) 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3, 4, 5, 6, 9

Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000) 10, 11, 12, 13, 14

Flynt v. Ohio, 451 U.S. 619 (1981) 6

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 6, 7

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 6

Gorton v. American Cyanamid Co., 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996) 8

Hawkins v. Leslie's Pool Mart, Inc., 184 F.3d 244 (3rd Cir. 1999) 12

Hughes v. Tennessee Seeds of Brownsville, Inc., 970 S.W.2d 471 (Tenn. Ct. App. 1997) 5, 8

TABLE OF AUTHORITIES – Continued

Page

ISK Biotech Corp. v. Douberly, 640 So.2d 85 (Fla. Ct. App. 1994), *review denied,* 651 So.2d 1194 (Fla. 1995) 4, 8, 9

Jeffers v. Wal-Mart Stores, Inc., 84 F.Supp.2d 775 (S.D. W.Va. 2000) 12

Lucas v. Bio-Lab, Inc., 108 F.Supp.2d 518 (E.D. Va. 2000) 12, 13

Lyall v. Leslie's Poolmart, 984 F.Supp. 587 (E.D. Mich. 1997) 12

Maddox v. Cosper, 25 S.W.3d 767 (Tex.App. – Waco 2000, no pet.) 2

Malone v. American Cyanamid Co., 649 N.E.2d 493 (Ill. Ct. App.), *appeal denied,* 657 N.E.2d 624 (Ill. 1995) 8

M & H Enterprises v. Tri-State Delta Chems., Inc., 984 S.W.2d 175 (Mo. Ct. App. 1998) 4, 8

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 7

Netland v. Hess & Clark, Inc., 284 F.3d 895 (8th Cir. 2002), *petition for cert. filed* (U.S. Aug. 9, 2002) (No. 02-219) 7

Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 14

Quest Chem. Corp. v. Elam, 898 S.W.2d 819 (Tex. 1995) 5, 10

Sleath v. West Mont. Home Health Servs., Inc., 16 P.3d 1042 (Mont. 2000), *cert. denied,* 122 S.Ct. 40 (2001) 8

Southland Corp. v. Keating, 465 U.S. 1 (1984) 6

TABLE OF AUTHORITIES – Continued

Page

Taylor Ag Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 4

Walker v. American Cyanamid Co., 948 P.2d 1123 (Idaho 1997) 8

WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 3

FEDERAL STATUTES

Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.* 2

7 U.S.C. § 136a(c)(5) 10, 11, 13

7 U.S.C. § 136j(a)(2)(A) 9

7 U.S.C. § 136v(b) 7, 9, 11, 12, 13

28 U.S.C. § 1257 ..... 1, 3

40 C.F.R. § 152.130(a) 9

40 C.F.R. § 158.540 ..... 10, 13

40 C.F.R. § 158.640 13

40 C.F.R. § 158.640(b)(1) 14

STATE STATUTE

Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE, § 17.41, *et seq.* 5

MISCELLANEOUS

S. Rep. No. 92-838, 92 Cong., 2d Sess. (1972) 13

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari ("Pet.") filed by American Cyanamid Company, seeking review of the decision of the Supreme Court of Texas entered in this case on June 6, 2002. That decision is not final, but it is correct.

JURISDICTION

The Court does not have jurisdiction of this case because the Texas Supreme Court's ruling is not a final judgment under 28 U.S.C. § 1257 for the reasons discussed at pages 3-9 below.

STATEMENT OF THE CASE

This is a false advertising case. Respondents Terry Geye and his son Brandon ("the Geyes") are peanut farmers who purchased and applied to their 1993 crop the herbicides Prowl and Pursuit, both of which are manufactured by Petitioner American Cyanamid Company ("Cyanamid"). In choosing these products, the Geyes relied upon representations made by Cyanamid in various brochures and magazine advertisements. According to the Texas court of appeals, "[t]hese advertisements stated that 'PURSUIT can be tank mixed with other popular products such as PROWL herbicide,'" and such "off-label statements merely repeated information on the [product] labels." *Pet. App. B* at 16a and n.2. The court further wrote that "[a]ll of plaintiffs' state law claims related directly or indirectly to the product label stating that the herbicides may be combined by tank mixing." *Id.* at 16a. However, of

the ten (10) specific advertising representations made by Cyanamid and catalogued in the Geyes' third amended petition in the trial court, only the representation quoted by the court of appeals concerned tank mixing. *App.* at 2a-3a. The court of appeals held "that plaintiffs' state law claims relating directly or indirectly to labeling are not preempted by FIFRA. . . . " *Pet. App. B* at 24a.

As an alternative reason for the Texas Supreme Court to affirm the judgment of the court of appeals, the Geyes argued that the court of appeals erred in holding that all of their claims related directly or indirectly to the product label stating that the herbicides may be combined by tank mixing. The Texas Supreme Court did not address this argument because it held "that the EPA does not regulate product labeling with respect to a product's target area phytotoxicity." *Pet. App. A* at 11a. Cyanamid suggests that "[t]he state supreme court did not *disturb* the findings of the court of appeals and trial court that all of Respondents' claims are directly or indirectly related to the herbicide products' EPA-approved labeling."[1] *Pet.* at 8 (emphasis

[1] Cyanamid maintains that the trial court "found" that all of the Geyes' claims are label-related, and that the court of appeals "agreed." *Pet.* at 6. That is simply wrong. The district court's finding, to which Cyanamid refers, is contained in a pre-judgment letter from the court to counsel. *Pet. App. C* at 28a. Under Texas summary judgment practice, "[t]he court's pre-judgment letter does not constitute competent evidence of the basis for the court's ruling." *Maddox v. Cosper*, 25 S.W.3d 767, 771 n. 5 (Tex.App. – Waco 2000, no pet.) (citing *Cherokee Water Co. v. Gregg County Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990)). The basis for the district court's ruling is contained in its final judgment where the court granted summary judgment to Cyanamid "on the ground that each and all of the Plaintiffs' claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, et seq." *Pet. App. C* at 25a.

added). Actually, the state supreme court did not *reach* the question of whether all of the Geyes' claims are label-related. The issue was mooted by the court's decision based on its interpretation of the breadth of the congressionally created exception to FIFRA preemption. *See Pet. App. A* at 14a.

REASONS FOR DENYING THE PETITION

I. THE COURT LACKS JURISDICTION

This case has been remanded by the state supreme court to the district court for trial on the merits. Cyanamid acknowledges that the judgment below is not final for the purposes of 28 U.S.C. § 1257, but attempts to fit the case within the final-judgment rule's fourth exception as set forth in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 483-84 (1975). That exception becomes applicable when both of the following criteria are met: (1) "where the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; and (2) "if a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* Neither of these criteria is here met.

A. The Decision of the Texas Supreme Court is not Final on all Federal Issues

The circumstances that warrant a departure from the final-judgment rule are "very few." *Cox,* 420 U.S. at 477 (quoting *WOW, Inc. v. Johnson,* 326 U.S. 120, 124 (1945)). This Court has observed that "[i]n most, if not all," of those few cases that fall within any of the *Cox* exceptions,

"additional [state court] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." *Id.* (footnote omitted). Reversal of the Texas Supreme Court's opinion would not be preclusive of any further litigation on the Geyes' relevant causes of action because there has been no final decision by the state supreme court on all of the federal issues involved in this case.

If the Texas Supreme Court's judgment is reversed on the ground on which it is based and the judgment is remanded, then that court would be called upon further to determine which of Cyanamid's express warranties are label-related and therefore ostensibly preempted by FIFRA, and which of the warranties are not label-related and therefore not preempted by FIFRA. Its decision on remand will be just as much a "final judgment" as the judgment presently submitted for review. If the Texas Supreme Court were to hold that one or more of the express warranties is not related directly or indirectly to the product label's tank-mixing statement, then Cyanamid will have a second "final judgment" on which to petition for a writ of certiorari. *See Taylor Ag Indus. v. Pure-Gro,* 54 F.3d 555, 563 (9th Cir. 1995) ("FIFRA does not preempt claims for breach of an express warranty that fall outside the scope of the manufacturer's label"); *ISK Biotech Corp. v. Douberly,* 640 So.2d 85, 88 (Fla. Ct. App. 1994), *review denied,* 651 So.2d 1194 (Fla. 1995) (FIFRA does not preempt a claim for breach of an express warranty which "was entirely distinct from any representation made on the [product] label"); *M & H Enterprises v. Tri-State Delta Chems., Inc.,* 984 S.W.2d 175, 183 (Mo. Ct. App. 1998) (FIFRA does not preempt a claim for breach of an express

warranty which "was not a mere restatement of information contained in the [product's] EPA-approved labeling"); *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 970 S.W.2d 471, 477 (Tenn. Ct. App. 1997) (FIFRA does not preempt a claim for breach of an express warranty which "exceeded or differed from the information contained in the product's label").

Any of Cyanamid's off-label representations that the state supreme court decides are not label-related can support not only the Geyes' claim for breach of express warranty, but also their multiple causes of action, *see App.* at 5a, for violations of the Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE, § 17.41, *et seq. See Cole v. Central Valley Chems., Inc.*, 9 S.W.3d 207, 210 (Tex.App. – San Antonio 1999, pet. denied) (FIFRA does not preempt claims for violations of the DTPA which "are not related directly or indirectly to labeling"). The Geyes' claims for strict liability and breach of implied warranty, *see App.* at 4a, also are actionable if they do not constitute attacks on the contents of Cyanamid's product labels. *See Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995) ("FIFRA does not . . . necessarily preempt state-law claims for strict liability or breach of implied warranty"). Whether any of the Geyes' causes of action are label-related is a question unanswered by the Texas Supreme Court.

The first requirement for invoking *Cox's* fourth exception – a final decision by the state courts on all federal issues – is totally absent.

B. Delaying Review of the Decision of the Texas Supreme Court Would not Seriously Erode Federal Policy

Even where the first prong of *Cox's* fourth exception is satisfied, "the question remains whether delaying review . . . would seriously erode federal policy within the meaning of [the Supreme Court's] prior cases." *Flynt v. Ohio,* 451 U.S. 619, 622 (1981). Delaying review of the state supreme court's decision in the present case would not seriously erode federal policy within the meaning of this Court's prior cases.

The federal policy in question – maintaining the national uniformity of pesticide product labels – is not of such importance that its possible disruption justifies the Court's attention at this stage of the proceedings. The policy pales in significance when compared to those policies that have merited the Court's prior consideration. Finality has been found as to otherwise interlocutory state court decisions that

- Imperiled federal control of national defense interests. *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988).
- Frustrated federal policy favoring arbitration. *Southland Corp. v. Keating,* 465 U.S. 1 (1984).
- Violated First Amendment rights. *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989).

In *Goodyear,* the Ohio Supreme Court's decision had "important implications for the regulation of federally owned nuclear production facilities in other States." 486 U.S. at 180. Delay in reviewing the California Supreme Court's ruling in *Southerland* would have "defeat[ed] the core purpose of a contract to arbitrate." 465 U.S. at 7-8. It

would have been "intolerable to leave unanswered . . . an important question of freedom of the press under the First Amendment." *Fort Wayne Books,* 489 U.S. at 56 (quoting *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n. 6 (1974)). By contrast, the case *sub judice* presents the unrealistic possibility that the label on a container of Prowl herbicide sold in Texas *might* bear a warning against tank-mixing this product with Pursuit herbicide, while the label on a container of Prowl sold in California *might not* bear the same warning. That is what the purported federal policy in question seeks to prevent.

The relative insignificance of the supposedly threatened federal policy is rivaled only by the insignificance of the threat. The crux of the Texas Supreme Court's decision is that "the EPA does not regulate product labeling with respect to a product's target area phytotoxicity. Thus the Geyes' crop-damage claim is not preempted." *Pet. App. A* at 11a. Thus the decision is limited to crop-damage claims involving target area phytotoxicity.[2]

Furthermore, the state court's decision will not impair the federal policy mandating national uniformity of

---

[2] A broader FIFRA preemption issue is presented by another case that clearly is final. *See Netland v. Hess & Clark, Inc.,* 284 F.3d 895 (8th Cir. 2002), *petition for cert. filed* (U.S. Aug. 9, 2002) (No. 02-219). Cyanamid notes that "[t]he certiorari petition in *Netland* . . . asserts that the Court should review [the] fundamental, widely accepted FIFRA pre-emption principal" that § 136v(b) of FIFRA expressly preempts all state damage claims "that implicate the adequacy or accuracy of the information contained on EPA-approved product labeling." *Pet.* at 13 and n. 3. A grant of certiorari in *Netland,* if resolved in the *Netland* petitioner's favor, would necessarily defeat the defense of FIFRA preemption in crop-damage claims, thereby mooting the issues in the present case.

EPA-approved labels. Cyanamid's protestations to the contrary are founded upon a false premise: "the Texas Supreme Court's decision will erode that federal policy by allowing individual Texas state court juries to destroy national labeling uniformity through imposition of damages awards." *Pet.* at 3. Historical fact does not support this mere supposition. The case at bar is the most recent instance in which the FIFRA preemption defense, or some aspect of that defense, has been rejected by a state appellate court. *See ISK Biotech,* 640 So.2d at 88-89 (claims for breach of express warranty and strict liability not preempted); *Walker v. American Cyanamid Co.,* 948 P.2d 1123, 1128 (Idaho 1997) (claim for breach of express warranty not preempted); *Malone v. American Cyanamid Co.,* 649 N.E.2d 493, 498 (Ill. Ct. App.), *appeal denied,* 657 N.E.2d 624 (Ill. 1995) (claim for breach of implied warranty not preempted); *M & H Enterprises,* 984 S.W.2d at 182-83 (claim for negligent misrepresentation not preempted); *Sleath v. West Mont Home Health Servs., Inc.,* 16 P.3d 1042, 1053 (Mont. 2000), *cert. denied,* 122 S.Ct. 40 (2001) (claims for negligence, strict liability and breach of express warranty not preempted); *Brown v. Chas. H. Lilly Co.,* 985 P.2d 846, 853 (Or. Ct. App. 1999), *review denied,* 6 P.3d 1098 (Or. 2000) (claims for negligence and strict liability not preempted); *Hughes,* 970 S.W.2d at 476-77 (claims for breach of express warranty, breach of fiduciary duty and negligence not preempted); *Gorton v. American Cyanamid Co.,* 533 N.W.2d 746, 755 (Wis. 1995), *cert. denied,* 516 U.S. 1067 (1996) (claim for negligent misrepresentation not preempted). In the aftermath of at least one of these decisions, a jury verdict adverse to the pesticide manufacturer should have resulted in a revamped pesticide label customized for use only in the plaintiff's home State – if Cyanamid's premise is correct. No such

event has occurred. All potentially affected labels have remained nationally uniform.

There is a logical explanation for this continuing uniformity. If, for example, ISK Biotech had wished to change the label on its fungicide Bravo 720 due to the jury's finding that Bravo 720 damaged plaintiffs' watermelon crop, *see ISK Biotech,* 640 So.2d at 86-87, then it would have submitted the proposed label change to the EPA for approval. *See* 7 U.S.C. § 136j(a)(2)(A) (making it unlawful to alter EPA-approved labeling). Once the requested approval was obtained, the label would have been placed on every container of Bravo 720 sold anywhere in the United States. *See* 40 C.F.R. § 152.130(a) ("Distribution under approved labeling"). On the other hand, ISK Biotech, like Cyanamid in the present case, could have opted not to inform the EPA of the adverse effects caused by the use of its pesticide. Either way, the pesticide label would have remained nationally uniform in its content.

The second requirement for invoking *Cox's* fourth exception – the potentially serious erosion of federal policy – is totally absent.

II. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

This case does not involve the question of whether 7 U.S.C. § 136v(b) preempts claims relating directly or indirectly to labeling.[3] That query already had been answered affirmatively by the Texas Supreme Court in

[3] *See supra* note 2.

Quest, 898 S.W.2d at 820. *See Pet. App. A* at 13a. Indeed, the answer to that inquiry or to some variation of it has underpinned the decision in almost every case where the FIFRA preemption defense has been raised. *See, e.g., Andrus v. AgrEvo USA Co.,* 178 F.3d 395, 398 (5th Cir. 1999).

The ultimate substantive issue raised by this case is whether the congressionally authorized efficacy data requirement waiver found in 7 U.S.C. § 136a(c)(5) and implemented through 40 C.F.R. § 158.540 includes data pertaining to target area phytotoxicity. After extensively reviewing the relevant statutory and regulatory scheme, *see Pet. App. A* at 3a-10a, the Texas Supreme Court determined "that the EPA does not regulate product labeling with respect to a product's target area phytotoxicity." *Id.* at 11a. For this reason the court below concluded that FIFRA does not preempt the Geyes' crop-damage claim. *Id.* In addressing FIFRA's preemptive effect on crop-damage claims, the court acknowledged

> that many jurisdictions that have considered this issue have reached the opposite result [citing, *inter alia, Andrus,* 178 F.3d 395]. But all these cases are based on the premise that the EPA regulates whether products are toxic to target area crops. For example, the California Supreme Court considered the efficacy waiver in a case factually similar to ours – *Etcheverry v. Tri-Ag Serv., Inc.*[, 993 P.2d 366 (Cal. 2000)].
>
> The plaintiffs in *Etcheverry* claimed that applying two products, Guthion and Morestan, reduced its walnut production, resulting in about $150,000 in damages. The California Supreme Court held that the plaintiffs' crop-damage claims were preempted by FIFRA, concluding

> that the EPA's waiver of efficacy data was "beside the point" and "irrelevant" because the plaintiffs were complaining about *phytotoxicity* and not *efficacy*. But in so holding, the California Supreme Court did not draw the essential distinction between phytotoxicity and target area phytotoxicity that the EPA historically has.

Pet. App. A at 12a (footnotes omitted; emphasis in original). In other words, the California Supreme Court and the Texas Supreme Court were dealing with different concepts. The California court ruled that "phytotoxicity" was not "efficacy"; and the Texas court ruled that "target area phytotoxicity" was included within the EPA's definition of "efficacy." *See id.* at 6a ("Essential to this case, the EPA has also chosen to include 'target area phytotoxicity' within the concept of efficacy, and therefore the EPA has chosen not to collect data concerning 'target area phytotoxicity' ").

The decision below represents the first ruling by any appellate court regarding how the distinction made by the EPA between phytotoxicity and target area phytotoxicity is critical to determining the breadth of the congressionally created exception to FIFRA preemption. That part of the *Etcheverry* opinion construing FIFRA's efficacy data requirement waiver, § 136a(c)(5), did not reach the issue. *See Etcheverry,* 993 P.2d at 374-76. Moreover, most, if not all, of the other appellate decisions holding crop growers' claims preempted by FIFRA do not distinguish between efficacy and other types of claims, but rather apply the general majority rule that failure-to-warn claims are preempted by § 136v(b). *See, e.g., Andrus,* 178 F.3d at 398-400. Under these circumstances, the Texas Supreme Court's opinion addressed an issue of first impression. Its

decision, therefore, cannot be in conflict with *Etcheverry, Andrus,* or the prior decision of any other court.

III. THE DECISION BELOW IS CORRECT

In its petition, Cyanamid does not draw the essential distinction between phytotoxicity and target area phytotoxicity. Instead, Cyanamid attempts to counter four "glaring flaws," *Pet.* at 16, in the Texas Supreme Court's reasoning, but does so with meritless arguments.

First, Cyanamid contends that, although there are no EPA requirements concerning target area phytotoxicity, the state supreme court's opinion may result in a Texas jury imposing labeling requirements that are "'different from'" or "'in addition to,' those required under FIFRA by EPA." *Id.* (quoting 7 U.S.C. § 136v(b)). The same contention was considered and rejected by the Third Circuit Court of Appeals in a case involving packaging requirements under § 136v(b): "When no federal packaging requirements have been established, logic dictates that a state law packaging requirement cannot be different from or in addition to the absent federal requirement." *Hawkins v. Leslie's Pool Mart, Inc.,* 184 F.3d 244, 253-54 (3rd Cir. 1999); *accord Lucas v. Bio-Lab, Inc.,* 108 F.Supp.2d 518, 524 (E.D. Va. 2000); *Jeffers v. Wal-Mart Stores, Inc.,* 84 F.Supp.2d 775, 781 (S.D. W.Va. 2000); *Lyall v. Leslie's Poolmart,* 984 F.Supp. 587, 595 (E.D. Mich. 1997). Cyanamid's "in addition to or different from" argument is fatally flawed because "it is at odds with the statutory text of FIFRA's preemption clause, which forecloses only those State requirements for [labeling] that are 'in addition to or different from *those required under this subchapter.*' And 'those required under the subchapter' clearly means

requirements imposed by regulations promulgated by EPA under the authority conferred by Congress." *Lucas,* 108 F.Supp.2d at 524 (construing the packaging requirements preemption provision of § 136v(b)) (emphasis in original). Under the authority conferred by Congress in 1978, 7 U.S.C. § 136a(c)(5), the EPA has chosen not to establish any requirements pertaining to the efficacy of agricultural herbicides. 40 C.F.R. §§ 158.540 and 158.640. Therefore, none of the Geyes' state law claims is "in addition to or different from" those requirements which do not exist.

Second, Cyanamid insists that the efficacy data waiver found in § 136a(c)(5) "is not some sort of exemption from, or exception to, § 136v(b)." *Pet.* at 17. Because neither the text nor the legislative history of § 136a(c)(5) refers to § 136v(b), Cyanamid surmises that "[i]t seems highly unlikely that Congress would have intended the efficacy data waiver authorization to effect a major limitation on the otherwise broad pre-emptive scope of § 136v(b)." *Pet.* at 18. By applying this same reasoning to § 136v(b), it seems highly unlikely that Congress ever intended the FIFRA labeling and packaging uniformity statute to effect a major limitation on state damages claims. The text of § 136v(b) does not mention preemption of state damages claims, nor does FIFRA's extensive legislative history. *See, e.g.,* S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993.

Third, Cyanamid quotes *Etcheverry* for the proposition that "'[a]lthough the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their initial registration, the agency does require and review such data if efficacy-related problems develop later.' *Etcheverry,* 993 P.2d at 375." *Pet.* at 18. The extent of the EPA's exercise of its discretionary authority is overstated

by the *Etcheverry* court. The EPA has the authority to demand or not to demand the pre-registration submission of efficacy data. It has opted to waive this requirement. The fact that the agency also has the authority to demand or not to demand – "reserves the right to require," 40 C.F.R. § 158.640(b)(1) – the post-registration submission of efficacy data does not, *ipso facto,* create data submission "requirements." The decision to require the submission of efficacy data is left to the discretion of the EPA at all times.

Fourth, Cyanamid accuses the Texas Supreme Court of failing to recognize the possibility that the EPA's "'decision to forego regulation in a given area may imply an authoritative determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision to regulate.'" *Pet.* at 20 (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 384 (1983)) (emphasis in original). Cyanamid's pure speculation as to the EPA's motive for not regulating product efficacy fails to acknowledge this Court's admonition that the quoted excerpt from the *Arkansas Electric* opinion "was obviously not meant in an unqualified sense; otherwise, deliberate federal inaction could always imply pre-emption, which cannot be." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.,* 485 U.S. 495, 503 (1988) (construing *Arkansas Elec.,* 461 U.S. at 384). "In this case, however, nothing in the language, history, or policy of [FIFRA] suggests [the] conclusion," *Arkansas Elec.,* 461 U.S. at 384, that the EPA intended to regulate pesticide efficacy through inaction; and Cyanamid has cited no authority to the contrary.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KERWIN B. STEPHENS
Counsel of Record
STEPHENS & MYERS, L.L.P.
515 Fourth Street
Graham, Texas 76450
(940) 549-4758

Attorneys for Respondents

NO. 35,851

TERRY GEYE and BRANDON GEYE	*	**IN THE DISTRICT COURT OF**
VS.	*	**EASTLAND COUNTY, TEXAS**
AMERICAN CYANAMID COMPANY	*	**91ST JUDICIAL DISTRICT**

PLAINTIFFS' THIRD AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

TERRY GEYE and BRANDON GEYE, Plaintiffs, file this Third Amended Original Petition against AMERICAN CYANAMID COMPANY, Defendant, for the following reasons:

1. Service of Process

Defendant, AMERICAN CYANAMID COMPANY, is a Maine corporation which has been served and has answered herein.

2. Statutory and Common Law Authority

This suit is brought pursuant to Tex Bus. and Com. Codes, Section 17.41 *et seq.*, commonly known as the Deceptive Trade Practices and Consumer Protection Act and cited in this petition as the "DTPA." This suit is also brought by reason of breach of express and implied warranty, and in strict liability by reason of the defective and unreasonably dangerous nature of the Defendant's herbicide products.

3. Venue

Venue of this action is proper in the County of suit because this cause of action accrued in whole or in part in Eastland County, Texas.

4. Notice: Conditions Precedent

(A) Defendant was given notice in writing of the claims made in this petition including a statement of Plaintiffs' actual damages and expenses including attorney's fees more than sixty (60) days before this suit was filed in the manner and form required by DTPA, Section 17.505(a).

(B) All conditions precedent necessary to maintain this action have been performed or have occurred.

5. Factual Circumstances

This lawsuit arises out of the purchase by Plaintiffs of certain herbicides known as "Pursuit" and "Prowl" for use in controlling weeds in the Plaintiffs 1993 peanut crop grown on their farms situated in Eastland and Brown Counties in the State of Texas. The Defendant, AMERICAN CYANAMID COMPANY is engaged in the manufacturing, packaging and distribution of these herbicide products to be used in such agricultural applications. Defendant placed its Pursuit and Prowl products into the stream of commerce.

AMERICAN CYANAMID COMPANY advertised such products in brochures and magazine advertisements as follows:

(1) "A sound choice for crop safety;"

(2) Does "not cause injury to peanuts;"

(3) "Safe to use on all peanut varieties;"

(4) "Pursuit® can be tank mixed with other popular products such as Prowl® herbicide;"

(5) Pursuit® provides "superior control. . . without injury to young peanut plants;"

(6) "Ideal for peanuts;"

(7) You can with Pursuit® control nutsedge "without injuring young peanut plants;"

(8) "Prowl® is gentle on young peanut plants and won't interfere with pegging;"

(9) "Clean fields and crop safety mean higher yields;"

(10) "This season get weed control and more peanuts. Get Prowl® herbicide."

All such representations substantially differed from, went beyond and were extrinsic of the label on the Prowl® and Pursuit® containers.

At the time of the Plaintiffs' purchase of the herbicides, these products were in sealed containers and were in the same condition as originally manufactured and sold. The Plaintiffs followed proper procedures in the application of the products in question on their peanut fields. The herbicides, instead of controlling the weeds in a safe and effective manner as intended and as advertised, caused damage to the Plaintiffs' peanut plants to the extent that the peanuts failed to properly grow and produce. Plaintiffs would show that the herbicide damage prevented the

peanuts from producing harvestable nuts which were to be expected under the circumstances for the crop year in question and which were similar to that produced by the Plaintiffs' fields which were not treated with a tank mixture combination of Prowl® and Pursuit® herbicide.

6. Causes of Action

The facts set forth in the preceding paragraph give rise to the following causes of action:

(A) The herbicides in question were defective and unsafe for their intended purposes for a combined tank mixture application at the time they left the control of Defendant AMERICAN CYANAMID COMPANY and at the time they were sold to the Plaintiffs. The products in question were unreasonably dangerous to the Plaintiffs' peanut crops and, did indeed cause herbicide damage to the Plaintiffs' crops. Accordingly, the Plaintiffs are entitled to recover under strict liability in tort.

(B) The Defendant also represented through non-label advertising and promotional material, as hereinabove described, that the products in question were safe and appropriate for utilization as a herbicide in peanut crops. In actuality, the herbicides in question were not appropriate for utilization in peanut crops as used and the herbicides in question were inherently dangerous to the Plaintiffs' peanut crop. Such is a breach of the express warranties which have heretofore been described. Additionally, the Defendant impliedly warranted to consumers that the herbicides were of merchantable quality and were safe and fit for the purposes intended when they were not.

(C) Plaintiffs would further show that the conduct of the Defendant is in violation of Section 17.50(a)(1); Section 17.50(a)(2); Section 17.50(a)(3); Section 17.46(b)(5); and Section 17.46(b)(7) of the DTPA. In this regard, Defendant's unconscionable conduct vitiates the written disclaimers and limitations of liability by which Defendant has sought to evade and escape its legal responsibilities.

7. Knowing Conduct

Defendant's hereinabove described conduct was committed "knowingly," as that term is defined in Section 17.45(9) of the DTPA. Prior to the transaction on which this lawsuit is based, Defendant had actual awareness of claims and complaints involving crop damage allegedly attributable to the herbicides in question. However, Defendant continued to make the representations and warranties of which Plaintiffs complain.

8. Causation: Actual Damages

(A) The conduct described in the preceding paragraphs was the producing and proximate cause of actual damages sustained by the Plaintiffs. The amount of Plaintiffs' damages exceed the minimum jurisdictional limits of the Court.

(B) The actual damages incurred by the Plaintiffs include the difference between the value of the peanuts that would have been produced without the use of the herbicides, or which were damaged because of the herbicides, and what was actually produced. Such losses exceed the sum of $200,000.00.

(C) Plaintiffs also seek recovery of all sums that they paid for the herbicides in question.

9. Additional Statutory Damages

Plaintiffs are entitled to recover two times that portion of their actual damages which do not exceed $1,000.00 and not more than three times the amount of their actual damages in excess of $1,000.00, all as allowed by Section 17.50(b)(1) of the DTPA as in effect at that time.

10. Attorney's Fees

Plaintiffs seek recovery of all reasonable and necessary attorney's fees in this case including attorney's fees incurred for preparation and trial of this lawsuit, post trial, pre-appeal legal services and for an appeal to the Court of Appeals as well as making or responding to a Petition for Review to the Supreme Court of the State of Texas, and an appeal to the Supreme Court of the State of Texas in the event such a Petition is granted.

11. Request for Relief

(A) Plaintiffs request that Defendant be cited according to law to appear and answer.

(B) Plaintiffs demand judgment against the Defendant for all actual damages and attorney's fees and all statutory additional damages as set forth above, costs of court, and prejudgment and post judgment interest at the highest lawful rate.

(C) Plaintiffs also ask for such other relief which the Plaintiffs may be justly entitled to receive.

12. Demand for Jury

Plaintiffs demand a jury trial. Plaintiffs' jury fee has been timely paid.

Respectfully submitted,

/s/_____

Kerwin B. Stephens
State Bar No. 19158600
STEPHENS & MEYERS, L.L.P.
515 Fourth Street
Graham, Texas 76450
Telephone: 940/549-4758
Telecopier: 940/549-3967

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served on opposing counsel and all counsel of record on the 14th day of August, 1998, in accordance with the Texas Rules of Civil Procedure.

/s/_____
Kerwin B. Stephens